IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY AND
DEE THOMASON FORD,
Petitioners,
v.
DENNIS MILHOLLIN AND MICHELLE MILHOLLIN,
Respondents.

FORD MOTOR CREDIT COMPANY,
Petitioner,
v.
DONNA M. EATON,
Respondent.

FORD MOTOR CREDIT COMPANY AND
MARV TONKIN FORD SALES, INC.,
Petitioners,
v.
DARRELL MESSINGER,
Respondent.

FORD MOTOR CREDIT COMPANY AND
WEBSTER-WOLFARD FORD, INC.,
Petitioners,
v.
DAVID P. ANDRESEN,
Respondent.

BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF POSITION AND INTEREST OF AMICI CURIAE

This Amici Curiae Brief is filed by National Consumer Finance Association ("NCFA"), Consumer Bankers Association ("CBA") and General Motors Acceptance Corporation ("GMAC") (herein collectively referred to as "Amici") pursuant to stipulation of counsel as provided for in Rule 42(1) of the Rules of the Supreme Court of the United States.

NCFA is the nation's largest trade association serving the consumer finance industry. Founded in 1916, the Association represents nearly 800 consumer finance and industrial banking companies operating more than 17,000 offices across the United States. Members of NCFA presently hold approximately ninety percent of the $50,000,000,000 in outstanding consumer credit of the industry. CBA is a national organization representing the consumer lending departments of approximately 325 commercial banks across the country. The members of CBA account for more than 60% of all consumer credit obligations held by commercial banks. GMAC is a credit finance institution engaged in the business of purchasing retail installment contracts from automobile dealers. GMAC conducts its operations from 398 branch offices in the United States and Canada, from which it provides financing services to over 18,400 General Motors dealers. At the present time, GMAC holds more than 4,000,000 retail installment contracts representing over $14,000,000,000 in outstanding credit.

GMAC and the members of NCFA and CBA are engaged in business in every state in the nation. A substantial portion of that business involves making consumer loans and acquiring retail installment contracts that are subject to the Federal Truth in Lending Act and Regulation Z. The decision by the Ninth Circuit below affects every consumer loan and retail installment contract held by GMAC and the members of NCFA and CBA in the jurisdiction of the Ninth Circuit.

Amici have read the Petition for a Writ of Certiorari filed by Petitioners herein. Amici endorse all of the reasons set forth in that Petition for the granting of a writ of certiorari. Because of the far reaching consequences of the decision below, Amici have submitted this Brief to provide additional argument on the national importance of the issues raised in the Petition and the widespread confusion and uncertainty that have resulted from the conflicting opinions issued by the Circuit Courts on these issues.

GMAC and the members of NCFA and CBA are engaged in the business of making consumer loans and acquiring retail installment contracts that are subject to the Federal Truth in Lending Act and Regulation Z. GMAC and the members of NCFA and CBA have been substantially and adversely affected by the decision of the Ninth Circuit below, since that Court held, contrary to an Official Interpretation of the Federal Reserve Board and the decisions of five other Circuit Courts, that the Truth in Lending Act and Regulation Z require disclosure of the creditor's right to accelerate an indebtedness upon default by the customer.

GMAC and the members of NCFA and CBA are defendants in hundreds of lawsuits in state and federal courts across the country in which the plaintiffs have alleged that they did not properly disclose the existence of an acceleration clause under the Truth in Lending Act and Regulation Z. GMAC and the members of NCFA and CBA are adversely affected by both the proliferation of such litigation and the uncertainty created by the conflict in the Circuits on this issue.

REASONS FOR GRANTING THE WRIT

I. Introduction.

The Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*) (herein the "Act") was enacted for the purpose of assuring meaningful disclosures of credit terms so that consumers could effectively comparison shop for credit. Truth in Lending Act § 102(a) [15 U.S.C. § 1601(a)]. Rather than attempting to fulfill this purpose totally by itself, and in order to achieve a desirable degree of uniformity and flexibility, Congress articulated broad guidelines regarding the items to be disclosed and authorized the Federal Reserve Board (herein the "Board") to set forth the specific disclosures to be made. Truth in Lending Act § 105 [15 U.S.C. § 1604]. *See Mourning* v. *Family Publications Service*, 411 U.S. 356, 365 (1973).

Pursuant to this authority, the Board promulgated Regulation Z (12 C.F.R. § 226). Building upon the Congressional guidelines set forth in the Act, the Board assembled a detailed list of the specific disclosures to be made. Regulation Z thus became the technical guideline for preparation of the meaningful disclosure statement mandated by the Act.

Although Regulation Z sets forth detailed and specific disclosure requirements, it has not proven to be sufficiently specific to eliminate a multitude of interpretive questions that have arisen concerning the disclosure requirements of the Act and Regulation. In an effort to promote a uniform interpretation of the Act and Regulation Z that creditors can rely upon in drafting disclosure forms, the Board has issued both formal and informal interpretations of the Act and Regulation Z relating to their application to a variety of practical factual problems. Creditors have drafted printed disclosure forms in conformity with those interpretations that have been used

in the millions of consumer credit transactions that are consummated each year.

Despite this effort by the Board to promote uniformity and to provide creditors with compliance guidelines, the federal and state courts have been besieged with litigation brought under the Truth in Lending Act. Since 1972, over eleven thousand cases have been brought in the federal courts alone alleging violations of the Act.[1] In many of these cases, highly technical and debatable violations have been alleged;[2] and disclosure forms have often been challenged even where they were drafted in strict conformity with the Board's interpretive guidelines.

The enormous volume of litigation has often resulted in conflicting decisions as to the disclosure requirements of the Act and Regulation Z. This conflict has also been spawned by the tendency of some courts to ignore or pay little deference to the views of the Board and to substitute judicial notions of what disclosures ought to be required for the clear requirements of the Act and Regulation Z.

This case presents a graphic illustration of the intolerable chaos and confusion that can result from such an *ad hoc* judicial approach to the disclosure requirements of Regulation Z. Section 128(a)(9) of the Act and Section 226.8(b)(4) of Regulation Z require a creditor to disclose any "default, delinquency, or similar charges

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[1] Administrative Office of the United States Courts, Annual Reports, 1976, 1978.

[2] Under the Act, civil liability is imposed upon the creditor if even only one violation is found. Truth in Lending Act § 130(a) [15 U.S.C. § 1640(a)]. This liability is imposed without regard to whether the violation was intentional and without regard to whether the debtor suffered any damages. This penal characteristic of the Act has been largely responsible for the thousands of cases that have been brought, many asserting novel and strained interpretations of the Act and Regulation Z.

payable in the event of late payments." Section 226.8(b)(7) of Regulation Z, which has no counterpart in the Act, requires the disclosure of the method by which any unearned portion of the finance charges will be rebated to the consumer when the contract is prepaid in full. Because of confusion and uncertainty over whether these sections of the Act and Regulation Z require any disclosure where a consumer credit contract contains an acceleration clause, the Board issued an Official Staff Interpretation of Regulation Z on March 21, 1977.[3] In that Official Interpretation, the Board stated that the presence of an acceleration clause in a consumer credit contract need not be disclosed provided that the creditor rebates unearned finance charges upon a payment of the indebtedness following acceleration in accordance with its disclosed rebate method for voluntary prepayment. This Official Interpretation represents a reasonable construction of the Act and Regulation Z and has been relied upon by creditors in drafting disclosure forms used in countless millions of consumer credit transactions.

Despite this clear Board position stated in an Official Interpretation, the United States Courts of Appeals for six different Circuits have ruled upon the disclosure requirements applicable to an acceleration clause and have failed to reach a consensus. As accurately and succinctly stated in the Petition for a Writ of Certiorari filed in this case:

> "The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth, and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits; the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions." [4]

[3] Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide ¶ 31,552, April 4, 1977.

The Ninth Circuit's decision rejecting the Board's Official Interpretation of its own Regulation was premised in part upon the Court's mistaken view that the interpretation it was rejecting was unofficial [*St. Germain* v. *Bank of Hawaii*, 573 F.2d 572, 576 (9th Cir. 1977)] and in part upon the Court's obvious policy conclusion that acceleration clauses are important and ought to be disclosed in all cases. In order to implement this judicial policy, the Court held that an acceleration of an indebtedness is itself a prepayment of the indebtedness that must be disclosed in all cases under Section 226.8(b)(7) of Regulation Z. This radical, unprecedented and illogical holding came as a complete surprise to the consumer credit industry. If the decision of the Court is permitted to stand, disclosure forms drafted in careful compliance with the Board's interpretive guidelines and used in millions of consumer credit transactions will be summarily invalidated.

As a direct result of this conflict and confusion in the Circuits, the federal and state courts will be deluged with more needless and wasteful litigation as trial courts across the land attempt to sort out the conflicting positions of the Circuits that have ruled on this important question and as additional Circuits offer their own interpretations of the Act and Regulation Z. This Court should intervene in order to resolve the irreconcilable conflict between the Circuits and to confirm the proper weight to be given the Regulations and interpretations of the Federal Reserve Board so that creditors can

[4] Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at p. 10, Ford Motor Credit Company and Dee Thomason Ford v. Dennis Milhollin and Michelle Milhollin, filed March 27, 1978, Docket No. 78-1487.

comply with the exacting requirements of the Act and Regulation Z.

II. The Petition for a Writ of Certiorari Should Be Granted to Settle Substantial and Recurring Questions As to the Weight to Be Given Federal Reserve Board Interpretations of Regulation Z.

The informed judgment of the Board in construing the Act has been accorded substantial weight by this Court:

> ". . . To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective." *Mourning* v. *Family Publications Service*, 411 U.S. 356, 365 (1973).

This Court has also noted that the deference to be afforded an agency's interpretation is even greater when the agency is interpreting its own regulation rather than a statute. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). In *Bone* v. *Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974), this special deference was upheld by the Ninth Circuit in the specific context of Section 226.8(b) (7) of Regulation Z:

> "Great deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretive and enforcement powers granted this agency by Congress under the Truth in Lending Act." 493 F.2d at 139.

Thus, an additional measure of deference should be given to the Board's interpretation of its own Regulation, and, absent compelling indications of error, a court should follow the Board's interpretation.

Judicial deference to the Board's statutory and regulatory interpretations is an essential element in the fair and efficient administration and enforcement of the Act. Through the exercise of its broad responsibilities under the Act, the Board has gained valuable experience and developed a unique level of technical expertise and understanding of the policy considerations underlying the Act:

> "We believe that it is precisely these kinds of policy decisions about the disclosure statement, requiring the weighing and balancing of the various available choices, that Congress entrusted to the Federal Reserve Board by granting it such broad powers. The conclusions thus reached by the Board are based upon its specialized experience and access to information, which is not likely to come to the attention of a particular judge in a given case." *Bone* v. *Hibernia Bank, supra,* 493 F.2d at 140.

Respect for the Board's view is also necessary in order to insure uniformity in the disclosures made by creditors, which is vital to the fulfillment of the purposes of the Act. A set of disclosure requirements, interpreted and applied uniformly, will provide a single form of disclosure that consumers can become familiar with and understand.

The need for a uniform interpretation of the disclosure requirements of the Act and Regulation Z is also grounded in concepts of fairness to creditors who must comply with the Act and the Regulation or be subject to severe penalties, including potentially enormous class action claims.[5] Printed forms that conform with the

[5] If a violation of the Act or Regulation Z is found, the creditor is liable for double the amount of finance charges imposed in the consumer credit transaction with a minimum liability of $100 and a maximum liability of $1,000. In a class action, the creditor's liability can be as high as $500,000 or 1% of the creditor's net worth, whichever is less. Truth in Lending Act § 130(a) [15 U.S.C. § 1640(a)]. In an effort to soften these severe civil liability pro-

Federal Reserve Board interpretations have been developed by creditors who have attempted in good faith to comply with the Act and the Regulation. These forms have been used in the literally millions of consumer credit transactions that are entered into each year. Absolute chaos will result if courts "second-guess" the Federal Reserve Board and adopt a construction of the Act or the Regulation that is inconsistent with a Board interpretation that is not plainly erroneous. Creditors attempting in good faith to comply with the law could place no confidence in the Board's uniform guidelines offered to assist them and instead would be subject to the vagaries of conflicting and unpredictable interpretations of the Act and the Regulation by trial and appellate courts across the land.

A final reason for giving special deference to the interpretations of the Board is to curb the flood of needless and costly litigation that has been prompted by the willingness of trial and appellate courts to ignore the Board's compliance guidelines and adopt new and novel disclosure rules designed to further a judicial disclosure policy not expressed in either the Act or Regulation Z.

This rule of special deference to Board interpretations has applicability here since the Official Interpretation in question was a Board Interpretation of Section 226.8 (b) (7) of Regulation Z dealing with prepayment disclosures. Section 226.8 (b) (7) has no counterpart in the Act. The Ninth Circuit, ignoring its own admonitions in *Bone* v. *Hibernia Bank*, *supra*, rejected the Board's Official Interpretation of its own Regulation and construed Regulation Z in a manner that no creditor could

visions, the Act was amended in 1976 to provide that the civil liability provision does not apply to any act done or omitted in good faith and in conformity with any rule, regulation or interpretation thereof by the Board even if the rule, regulation or interpretation is thereafter rescinded or declared invalid. Truth in Lending Act § 130(f) [15 U.S.C. § 1640(f)].

reasonably have anticipated. The Ninth Circuit held that acceleration of an indebtedness is itself a prepayment of the indebtedness so that Section 226.8 (b) (7) of Regulation Z "compels a creditor making a consumer loan to disclose the creditor's right to accelerate . . . ." *St. Germain* v. *Bank of Hawaii*, 573 F.2d 572, 573 (9th Cir. 1977). *Accord*, *Milhollin* v. *Ford Motor Credit Co.*, 588 F.2d 753, 758 (9th Cir. 1978). This decision by the Court conflicts with the Board's Official Interpretation and the views of five other Circuits and defies logic and common sense. Acceleration is the antithesis of prepayment since acceleration occurs only when the debtor has *failed* to pay the indebtedness. As a result of these decisions by the Ninth Circuit, disclosure statements prepared in good faith by creditors attempting to comply with the many complex and technical requirements of the Act and Regulation Z have been thrown into violation of the Act.

Although the Ninth Circuit was undoubtedly of the view that acceleration clauses ought to be disclosed, it was not within the province of the Court to impose or create such a requirement where both the Act and Regulation Z are silent. As the Eighth Circuit recently noted with respect to this very issue:

> "Defendants' disclosure statement fully complies with the Act and Regulation Z in describing the method of rebate in the event of prepayment. Regulation Z, fairly read, requires only the disclosure of the consequences of prepayment, not the effect of the exercise of a right to accelerate. In our judgment, no such additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the

potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board." *Griffith* v. *Superior Ford*, 577 F.2d 455, 459 (8th Cir. 1978).

Where, as here, a creditor complies in good faith with all of the requirements of the Act and Regulation Z as reasonably interpreted by the Federal Reserve Board, the creditor should not be subjected to liability upon the basis of a questionable theory that finds no textual support in the Act or Regulation Z. In a highly regulated area such as this, creditors should be allowed to rely upon the unambiguous requirements of the Act and Regulation Z. This Court has an opportunity in this case to confirm this basic principle in the context of issues that affect the entire consumer credit industry and virtually every consumer credit transaction.

III. The Petition Should Be Granted to Resolve the Conflict in the Circuits and Establish a Uniform Rule With Respect to the Disclosure of Acceleration Clauses.

The acceleration issue has been treated by six different Circuit Courts of Appeals. As Petitioners correctly point out, a different rule of compliance has been produced in nearly every one of these Circuits. This divergence of opinion is the most extreme and serious conflict among the Circuits to arise under the Truth in Lending Act.[6]

[6] The Circuits have also reached conflicting results on the question of whether joint debtors in a single transaction are each entitled to the statutory penalty where a violation is found. The Ninth Circuit in this very case pointed to this conflict and held that only one recovery is permitted for a single violation:

"The circuits have split on this issue. The Fifth and Seventh Circuits have concluded that a husband and wife as joint obligors are entitled to separate recoveries. *Davis* v. *United Companies Mortgage & Inv. of Gretna, Inc.*, 551 F.2d 971 (5th Cir. 1977); *Mirabal* v. *General Motors Acceptance Corp.*, 537 F.2d 871, 881-83 (7th Cir. 1976); *Allen* v. *Beneficial Finance Co. of Gary*, 531 F.2d 797, 805-06 (7th Cir.), cert. denied, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976). The Fourth Circuit reached the opposite result in *Powers* v. *Sims and Levin*, 542 F.2d 1216, 1219-20 (4th Cir. 1976), in which the court limited the recovery of husband and wife as joint obligors to one penalty.

We believe that the Fourth Circuit's approach more closely reflects the intent of Congress." *Milhollin* v. *Ford Motor Credit Company*, 588 F.2d 753, 758 (9th Cir. 1978).

The uncertainty and lack of uniformity in the Circuits has caused considerable problems for consumers and creditors alike. For the consumer, the split in the Circuits has resulted in confusion since disclosures by creditors are no longer uniform, thus defeating the purpose of the Act to permit consumers to comparison shop for credit.

For the creditor, the lack of uniformity between the Circuits has resulted in a perplexing dilemma. Many institutional creditors, such as GMAC and the members of NCFA and CBA, engage in business in every state in the nation. Despite certain local variations, the disclosure statements used by these creditors have maintained a high degree of uniformity. As a result of the conflict in the Circuits on the acceleration issue, creditors doing business on a nationwide basis may no longer employ uniform disclosure statements under the Act and Regulation Z. This is best illustrated in the case of Petitioner Ford Motor Credit Company which has prevailed in two Circuits, yet lost in a third, on substantially the same disclosure statement. *Compare Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975) and *Griffin* v. *Superior Ford*, 577 F.2d 455 (8th Cir. 1978), *with Milhollin* v. *Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978). Indeed, it is conceivable that a creditor could deliver a disclosure state-

ment that complies with the Act and Regulation Z in the Circuit in which the transaction was consummated and yet be held liable for a violation of the Act and Regulation Z because an action is brought by a consumer in a Circuit adopting a contrary rule.[7]

The Circuits have had more than ample time to reconcile their conflicting decisions. It is apparent that the passage of time alone will not alleviate the problem and will, in all likelihood, aggravate the conflict. This case is therefore ripe for a decision from this Court.

CONCLUSION

For the above reasons, Amici Curiae respectfully urge this Court to grant the Petition for a Writ of Certiorari to review the opinion and judgment of the Ninth Circuit below.

DATED: April 19, 1979.

Respectfully submitted,

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[7] This is not merely a hypothetical possibility since debtors often change their state of residence during the term of a consumer credit transaction.